

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION II

DAVID R. DODD,
DAVID E. DODD, and
DIANN D. MARTIN, and other
similarly situated minority
shareholders of
Potomac Riverside Farm, Inc.,

Plaintiffs/Counter Defendants,

v.

POTOMAC RIVERSIDE FARM, INC.,

Defendant/Counter-Plaintiff,

and

POTOMAC RIVERSIDE FARM, INC.,
LOGAN D. WANNAMAKER,
MARJORIE LEE WANNAMAKER,
NATIONAL CITY BANK, Trustee of
Voting Trust Agreement of
Potomac Riverside Farm, Inc.,
and Trustee of Edwin D. Dodd Trust,
SARAH D. KAUFFMAN, as President of
Potomac Riverside Farm, Inc.,

Defendants.

ORDER DETERMINING RATE OF INTEREST, COSTS, EXPERT WITNESS' FEES,
AND ATTORNEY'S FEES

This matter came before the Court this 5th day of October 2006, pursuant to the
parties' memoranda concerning interests and costs. Upon the appearance of Plaintiffs David R.

02-C-320 ORDER DETERMINING RATE OF INTEREST, COSTS, EXPERT WITNESS' FEES, AND ATTORNEY'S FEES

CIVIL ACTION
NO. 02-C-320
JUDGE WILKES

BERKELEY COUNTY
CIRCUIT CLERK
OCT -6 PM 12:18
VIRGINIA SINE CLERK

Dodd, David E. Dodd, and Diann D. Martin ("Plaintiffs"), by counsel Peter A. Pentony, Esq. and Defendants Potomac Riverside Farm, Inc., Logan D. Wannamaker, Marjorie Lee Wannamaker, National City Bank, and Sarah D. Kauffman ("Defendants"), by counsel Tammy Mitchell Bittorf, Esq. Defendant Sarah D. Kauffman, by counsel William J. Powell, Esq., did not submit a response.

I. FINDINGS OF FACT

- 1) Plaintiffs are three minority shareholders of Potomac Riverside Farms, Inc. ("PRF").
- 2) Defendants consist of PRF, the corporation, the voting trust trustee, and three members of PRF's board of directors.
- 3) PRF had minimal revenues and two parcels of real property. (Comm'r Recommend. Find. at 4.)
- 4) The real property consisted of two farms ("PRF farms") located in Berkeley County, West Virginia. (*Id.* at 7.)
- 5) "Plaintiffs were emotionally tied to the real estate...and attempted to do what they could, over the years, to retain the [property]." (*Id.* at 11.)
- 6) The Dodd family owned the PRF farms for seven generations. (*Id.* at 8.)
- 7) The PRF farms are adjacent to Quail Creek Farm ("QCF"), which the Edwin D. Dodd Trust owned after Edwin Dodd's death in January 2001.
- 8) In 1997, the PRF farms appraised for \$1,120,000.
- 9) On January 2, 2001, QCF appraised for \$3,080,000 and the PRF farms appraised for \$1,250,000.

- 10) On August 30, 2001, Plaintiffs objected to the sale of the PRF farms, but the majority shareholders approved the sale. (*Id.* at 2.)
- 11) From August 31, 2001 through June 12, 2003, Defendants held no corporate funds capable of investment. (Defs. Combined Mem. Interest at 7.)
- 12) On March 21, 2002, WV Hunter LLC offered to purchase QCF and the PRF farms for \$5,000,000.
- 13) On July 8, 2002, Plaintiffs filed this Complaint and recorded a *lis pendens* against the PRF farms.
- 14) On July 31, 2002, WV Hunter LLC signed a contract to purchase the QCF, the PRF farms, and the Estate's personal property for \$5,000,000.
- 15) On January 31, 2003, the Court ordered the removal of the *lis pendens* and ordered that Plaintiffs' sole remedy, if any, would be monetary damages.
- 16) In its January 31, 2003 Order, the Court ordered that the Defendants to place the sale proceeds in a constructive trust.
- 17) On June 12, 2003, WV Hunter LLC finalized its purchase for \$5,000,000.
- 18) On June 27, 2003, Defendants executed a statutorily mandated offer per share to Plaintiffs, i.e., \$835.51 per share for 357 shares. (*See* Pls. Mem. Concern. Interest Costs at 12.)
- 19) On February 10, 2005, Defendants made an offer of judgment for \$367,500.00.
- 20) On February 18, 2005, Defendants made an offer of judgment for \$414,500.00.
- 21) On April 13, 2005, the Court ordered the appointment of a Special Commissioner to provide a recommended decision on the question of fair value of Plaintiffs' shares.

- 22) The Court's April 13, 2005 Order also determined that W. VA. CODE § 31-1-123 (2001), repealed by Acts 2002, c. 25, 2nd Ex. Sess. eff. Oct. 1, 2002, would still apply to the case, *sub judice*. The revised statute is W. VA. CODE § 31D-1-101 et seq.
- 23) On June 9, 2005, the Court appointed Oscar M. Bean, Esq. as Special Commissioner to determine the fair value of Plaintiffs' shares in PRF.
- 24) On October 26 and 27, 2005, the parties presented evidence before Commissioner Bean.
- 25) At the hearing, Defendants argued that the Commissioner should value Plaintiffs' shares at \$600.00 per share. (Pls. Mem. Concern. Interest Costs at 12.)
- 26) In opposition, Plaintiffs contended that the Commissioner should value their shares at \$1,536.25 per share. (Defs. Combined Mem. Interest at 3.)
- 27) On December 6, 2005, Commissioner Bean filed his Recommended Findings.
- 28) In his Recommended Findings, Commissioner Bean made the following findings of fact and conclusions of law:
- 29) Commissioner Bean found the fair value of Plaintiffs' shares to be \$952.37 per share. (Comm'r Recommend. Find. at 14.)
- 30) Under the heading, "Other Matters," the Commissioner also determined that 8% "feels right" because the Defendants' expert cited that as a conservative interest rate and the statutory interest rate is 10%. (*See id.* at 14-16.)
- 31) The Commissioner found that the Plaintiffs did not act in bad faith and therefore assessed costs to the corporation and each party should bear its own attorney and witness fees. (*See id.* at 16-17.)

- 32) On January 17, 2006, Defendants objected to the Commissioner's Recommended Interest, the assessment of costs against the corporate Defendant, and that each party pay its own attorney and witness' fees.
- 33) On April 6, 2006, this Court upheld the Commissioner's findings, in part. This Court upheld Commissioner Bean's assessed fair value of \$952.37 per share.
- 34) The Court disapproved the Commissioner's findings regarding interest, costs, and attorney's fees because it went beyond the scope of the Court's reference order.
- 35) The fair value of \$952.37 per share exceeded the Defendants' statutory offer of \$835.51 by \$116.86 per share. (See Pls. Mem. Concern. Interest Costs at 12.)
- 36) The fair value of Plaintiffs' shares exceeded Defendants' statutory offer by 14%.
- 37) Since the sale on June 12, 2003 through March 1, 2006, the proceeds held in constructive trust have earned 1.674% interest. (Defs. Resp. Mem. Interest Costs at 4.)

II. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

[D]issenter's rights statutes are construed favorably toward the shareholder, particularly where there is no prejudice to the corporation. As a corollary, such statutes are given a reasonable construction rather than a rigid and technical one. Doubts arising from a lack of precision or accuracy in the statute should, where possible, be resolved in favor of the dissenting shareholder.

Matter of Fair Value of Shares of Bank of Ripley, 184 W. Va. 96, 399 S.E.2d 678 (1990). With these presumptions in mind, the Court considers the arguments of the parties.

A. Determination of Interest

1. History of the Dissenting Shareholder Interest Statute

Plaintiffs contend that the statute, fairness, and legislative intent dictate a 10% interest rate. (See Pls. Mem. Concern. Interest Costs at 4-5.) During the pendency of this lawsuit, legislature has twice revised the minority shareholder statute. The parties are subject to the code section applicable at the time Plaintiffs filed their objection to the shareholder vote:

Within ten days after such corporate action is effected, the corporation...shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each shareholder to pay for such shares at a specified price deemed by such corporation to be fair value thereof...

If within such period of thirty days, a dissenting shareholder and the corporation do not [agree on the fair value], then the corporation shall...file a complaint in a court of general civil jurisdiction requesting that the fair value of such shares be found and determined, or the corporation may file such complaint at any time within such sixty-day period at its own election...

The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and

authority as shall be specified in the order of their appointment or any subsequent appointment.

The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment.

W. VA. CODE § 31-1-123(e) (2001) (emphasis added). In 2002, legislature revised the statute, making the interest rate the same as the prejudgment statutory interest rate in effect on the date of the corporate action: “‘Interest’ means interest from the effective date of the corporate action until the date of payment, *at the rate of interest on judgments in this state on the effective date of the corporate action.*” W. VA. CODE § 31D-13-1301(5) (emphasis added). On the effective date of the corporate action in 2001, legislature had set the rate of interest at “...ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law.” W. VA. CODE § 56-6-31 (2001).

Finally, on March 23, 2006, legislature again revised the statute, this time making the interest rate 3 points above the Fifth Federal Reserve District Rate, as of the 2nd day of January of the year of judgment:

Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve

District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered:

Provided, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum.

W. VA. CODE, § 56-6-31 (2006). Therefore, the current statute sets a floor of 7% interest and a ceiling of 11%.

In considering the evolution of the interest statutes, it is apparent that legislature is continuously reviewing its laws to ensure that it compensates shareholders reasonably and fair. Originally, the statute left full discretion to the Court. "The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances..." W. VA. CODE § 31-1-123(e) (2001). Subsequently, legislature set the interest at a flat rate of 10%. W. VA. CODE § 31D-13-1301(5) (2002). Finally, the statute currently calls for interest to be 3 points above the Federal Reserve, but not above 11% or below 7%. From this history, the Court determines that legislative intent is to move away from absolute Court discretion and move towards uniformity. However, the 2001 statute controls the Court's decision. Therefore, the Court will use discretion to achieve a fair interest rate, while considering the legislative intent of consistency.

2. The Court Awards Simple Interest to Plaintiffs

Plaintiffs argue that they should receive compound interest. "Where there exists no statute or express written agreement establishing the type of prejudgment interest as being compound, and in the absence of a recognized exception which would permit the recovery of

compound prejudgment interest, prejudgment interest is simple in kind. Code, 56-6-31.” *Bruce v. Steele*, 215 W. Va. 460, 599 S.E.2d 883 (2004). Since W. VA. CODE § 31-1-123(e) does not articulate compound interest, this Court will award simple interest.

The statute...provides that a judgment in favor of a dissenting stockholder for the value of his stock shall include an allowance for interest ‘at such rate as the judge may find to be fair and equitable in all the circumstances.’ Thus, under the plain language of the statute, the amount of the allowance of interest is left to the discretion of the trial court. In its decree the court expressly stated that it found the allowance of interest at the rate of 2% ‘to be fair and equitable in all the circumstances.’ There is no showing to the contrary.

Lucas v. Pembroke Water Co., 205 Va. 84, 135 S.E.2d 147 (1964). Therefore, in its discretion, this Court awards interest to Plaintiffs as set out herein.

3. Pertinent Facts for the Determination of Interest

In determining the interest rate, this Court considers the following facts, *inter alia*:

- a) The corporation, “PRF,” had minimal revenues and two parcels of real property from the date of the corporate action, August 30, 2001, through the date of the sale, June 12, 2003.
- b) The majority shareholders of PRF (Defendants) held no corporate funds capable of investment, from the date of the corporate action, August 30, 2001, through the date of the sale, June 12, 2003.

- c) From the date of the sale on June 12, 2003 through March 1, 2006, Defendants earned 1.674% interest on the sale proceeds held in the constructive trust.
- d) Defendants' statutory offer was \$835.51 per share.
- e) The fair value of Plaintiffs' shares exceeded Defendants' statutory offer by \$116.86 per share.
- f) The fair value of Plaintiffs' shares exceeded Defendants' offer by 14%.

4. The Court's Determination of Interest

In applying these facts, the Court makes the following decision regarding interest:

- a) Plaintiffs shall receive *no* interest on \$835.51 per share for the time period of August 30, 2001 through June 12, 2003.
- b) Plaintiffs shall receive 10% simple interest on \$116.86 per share for the time period of August 30, 2001 through the date the Court enters this order.
- c) Plaintiffs shall receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003 through the date the Court enters this order.
- d) Plaintiffs shall receive post judgment interest at statutory rate pursuant to W. VA. CODE, § 56-6-31 (2006).

B. Determination of Costs, Expert Witness' Fees, and Attorney's Fees

Plaintiffs petition this Court for the corporation to pay their expert witness' fees and all costs of the Commissioner's hearing, including room rental, the Commissioner's fees and expenses, and the court reporter.

The costs and expenses of any such [appraisal] proceeding shall be determined by the court and *shall be assessed against the*

corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares if the court shall find that the action of such shareholders in failing to accept such offer was *arbitrary or vexatious or not in good faith*. Such expenses shall include reasonable compensation for and reasonable expenses of the appraisers, but *shall exclude* the fees and expenses of counsel for and experts employed by any party; but if the fair value of the shares as determined *materially exceeds* the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

W. VA. CODE § 31-1-123(e) (2001) (emphasis added). Defendants contend that Plaintiffs acted arbitrarily, vexatiously, or with bad faith because the fair value only exceeded the offer by \$116.86 and Plaintiffs filed a *lis pendens*, which the Court found improper. The Court finds that Plaintiffs successfully obtained a fair value for their shares that exceeded Defendants' offer. Therefore, Plaintiffs did not act arbitrary or vexatious. Furthermore, even though the Court removed the *lis pendens*, the Court finds that Plaintiffs made colorable arguments in good faith.

Accordingly, the Court finds that the corporation shall pay all costs, expenses, and fees associated with the Special Commissioner proceeding.

Plaintiffs assert that the corporation should pay their expert witness' fees because the fair value of shares exceeded the Defendants' offer. Even though Plaintiffs were successful, the fair value of the shares did not materially exceed Defendants' offer. "The referee found the fair value of the Dissenters' shares to be over 260% of the amount [the corporation] offered to pay therefor. Thus the 'materially exceeds' precondition for the discretionary award of expert and attorney fees was clearly triggered." *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997 (Me. 1989). In the instant case, the fair value exceeded Defendants' offer by 14%. The Court finds that this was not a material increase, and therefore, the Court holds that Plaintiffs are to pay their own expert witness' fees.

Finally, the Defendants request attorney's fees because they made two Offers of Judgment. However, the Defendants did not increase their offer of the per share value. Actually, Defendants decreased the per share valuation during the Commissioner hearing. Furthermore, the Court already found that Plaintiffs did not act arbitrarily, vexatiously, or in bad faith. Therefore, the Court DENIES Defendants' request for attorney's fees.

III. RULING

Accordingly, the Court finds as follows:

- 1) Plaintiffs shall receive *no* interest on \$835.51 per share for the time period of August 30, 2001 through June 12, 2003.
- 2) Plaintiffs shall receive 10% simple interest on \$116.86 per share for the time period of August 30, 2001 through the date the Court enters this order.

- 3) Plaintiffs shall receive 1.674% simple interest on \$835.51 per share for the time period of June 13, 2003 through the date the Court enters this order.
- 4) Plaintiffs shall receive post judgment interest at statutory rate pursuant to W. VA. CODE, § 56-6-31.
- 5) The corporation, Potomac Riverside Farm, Inc., shall pay all costs, expenses, and fees associated with the Special Commissioner proceeding.
- 6) Plaintiffs are to pay their own expert witness' fees.
- 7) The Court DENIES Defendants' request for attorney's fees.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to enter this order and distribute attested copies to the following counsel of record:

Counsel for Plaintiffs:

Peter A. Pentony, Esq.
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Counsel for Defendants:

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Trump & Trump, LC
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Counsel for Defendant Sarah D. Kauffman:

William J. Powell, Esq.
Jackson Kelly PLLC
PO Box 1068
Martinsburg WV 25402

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: *Martha Melnick*
Deputy Clerk

[Signature]
CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA